Filed 3/29/05

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MICHAELIS, MONTANARI & JOHNSON, Petitioner, v. THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES, Respondent. CITY OF LOS ANGELES, DEPARTMENT OF AIRPORTS et al., Real Parties in Interest.	B178884 (Super. Ct. No. BC090033) (Dzintra Janavs, Judge)

ORIGINAL PROCEEDING. Petition for writ of mandate granted.

Michaelis, Montanari & Johnson, Garry L. Montanari and Nathan B. Rand for Petitioner.

No appearance for Respondent.

Rockard J. Delgadillo, City Attorney, Eduardo A. Angeles, Managing Assistant City Attorney and M. Lynn Mayo, Deputy City Attorney, for Real Parties in Interest.

Petitioner made a request to the City of Los Angeles under the California Public Records Act (Govt. Code[1] §6250 et seq.) for copies of proposals for the lease of a hangar facility at the Van Nuys airport. The City's Request for Proposals specifically provides that the proposals are public records. Petitioner made its request after the deadline for submitting the proposals had passed, but before the City had selected the successful bidder. The City agreed to honor the request, but only after it had completed negotiations with the successful bidder. The superior court denied petitioner's mandate petition, citing section 6255, which provides that a public entity may withhold a public record from disclosure if the public entity demonstrates to the court's satisfaction that the public interest served by not making the record public clearly outweighs the public interest served by disclosing it. After conducting an independent review of the record (*Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1336), we conclude respondent court's order is not supported by substantial evidence. Applying the balancing test required by section 6255, we conclude the City was obligated to make copies of the proposals public once the deadline for submitting the proposals had passed in February 2004, not months later after the City had concluded negotiations with the successful bidder.

FACTS AND PROCEDURAL HISTORY

On November 3, 2003, the City of Los Angeles Department of Airports, also known as Los Angeles World Airports (LAWA), issued a Request for Proposals (RFP) for the lease of a 7.2854-acre parcel of land at Van Nuys airport. Situated on the parcel is a complex consisting of three hangars, two office buildings, and a fuel farm. Proposals were to be submitted by December 15, 2003, although the date was thereafter extended to February 15, 2004. LAWA would select the successful bidder based on a number of criteria, including the proposed use of the property, financial capability and

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[1] All further statutory references are to the Government Code unless otherwise indicated.

responsibility, management qualifications and experience, general reputation to conduct aeronautical services, scope of aviation services to be provided and "other such factors as LAWA deems appropriate." LAWA received eight proposals in response to the RFP.

On April 19, 2004, after the deadline for submitting proposals had passed, but before LAWA had selected the successful bidder, petitioner submitted to the Airport Division of the Los Angeles City Attorney a Public Records Act request for copies of all proposals submitted in response to the RFP.[2] The City's response to petitioner's request was due within 10 days thereafter. (§6253, subd. (c)(2)) One day before the 10-day deadline, petitioner inquired whether a response would be forthcoming and was told the City Attorney never received the request. Petitioner resubmitted the request by fax on April 29, 2004.

On May 7, 2004, petitioner received a letter from Jess Romo, Airport Property Manager for LAWA, who informed petitioner that LAWA, not the City Attorney, was the custodian of records for the proposals. Mr. Romo said LAWA would be pleased to provide petitioner with copies of the proposals, but only after LAWA had concluded negotiations with the (yet to be named) successful bidder. Mr. Romo noted the "long-established practice of most governmental agencies to make RFP proposals available for public review at the time the contract is presented to the awarding authority for award. More precisely, proposals are first available for review when the awarding authority's agenda containing the contract to be awarded is published. [¶] This practice allows for the public to obtain the information prior to the awarding authority's consideration and award of the contract. Importantly, it also allows the governmental entity, on behalf of its residents and taxpayers, to complete the negotiations without the proposers knowing each

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[2] The RFP specifically provides that the submitted proposals are "a matter of public record," with the exception of proprietary information that the proposer may submit under separate cover. The provision is consistent with The Los Angeles City Charter, section 372, and the Los Angeles Administrative Code, section 10.17, which require that in all cases, the award process of a competitive proposal be documented as a public record.

other's price and terms. To make proposals available for public review prior to this time would seriously impact the government's ability to negotiate a fair and cost effective proposed contract." As support for LAWA's decision, Mr. Romo cited sections 6254, subdivisions (h) and (k)[3] and 6255.[4]

On May 12, 2004, petitioner filed a mandate petition in superior court. (§6258) The court did not have a hearing date available until September 7, 2004, long after the successful bidder was to be chosen, and petitioner's ex parte attempt to advance the hearing date gained him only a week. Petitioner later agreed to continue the hearing to September 13, 2004, to accommodate the City Attorney.

On June 8, 2004, the City Attorney provided petitioner with the names of the companies that had submitted proposals, but did not provide copies of the proposals themselves, although the deadline for submitting proposals had long since passed. The City Attorney opined that disclosing the information at that time "would irretrievably corrupt the process and harm not only the respondents, but also city taxpayers who may not receive the best value in return for the expenditure of their tax dollar," because the

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[3] Section 6254 provides that among the categories of documents exempt from disclosure under the Act are the following:

"(h) The contents of real estate appraisals or engineering or feasibility estimates and evaluations made for or by the state or local agency relative to the acquisition of property, or to prospective public supply and construction contracts, until all of the property has been acquired or all of the contract agreement obtained. However, the law of eminent domain shall not be affected by this provision. [¶] . . . [¶]

(k) Records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege."

[4] Section 6255 provides: "(a) The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record."

successful bidder would gain a negotiating advantage if it knew the details of the unsuccessful bidders' proposals. The City Attorney referred petitioner to Section 10.15(f) of the Los Angeles Administrative Code, which relates to competitive bidding. That section provides: "Proposals shall be opened and their contents secured to prevent disclosure during the process of negotiating with competing proposers. The proposals shall be opened publicly, but only the names of the proposers shall be revealed. Adequate precautions shall be taken to treat each proposer fairly and to insure that information gleaned from competing proposals is not disclosed to other proposers. Prices and other information concerning the proposals shall not be disclosed until a recommendation for award is made to the awarding authority."[5]

On June 30, 2004, LAWA mailed letters to all the bidders announcing that its evaluation panel had selected Castle & Cooke Aviation Services as the best-qualified firm for the project. LAWA told the unsuccessful bidders that if they wanted to "provide additional information" they could do so by "completing a public comment card." Under the provisions of the RFP, if petitioner wanted to submit a protest concerning the award it was required to do so "by 5:00 p.m. of the fifth business day after the issuance of a notice of intent to award the Lease." Any such protest had to contain "a full and complete statement specifying in detail the grounds of the protest and the facts in support thereof." Suffice it to say petitioner would have been hard pressed to formulate a protest that met the RFP's guidelines because it was not privy to the contents of all eight proposals.

The award to Castle & Cooke Aviation was placed on the agenda for the July 19, 2004, meeting of the Board of Airport Commissioners. Despite Mr. Romo's comment that this would be the appropriate time to disclose the contents of the proposals, LAWA did not provide the proposals to petitioner. The Board did not approve the award at its July 19th meeting. Rather, the Board deferred its decision and returned the matter to LAWA staff to "evaluate all scenarios of all proposals for the highest and best return to

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[5] In its return to the petition, the City conceded that this provision of the Administrative Code is merely "instructive" and does not cover the proposals at issue here.

LAWA prior to presenting an agenda item to the Board." LAWA staff scheduled meetings with three proposers in mid-September 2004.

On September 13, 2004, respondent court issued its tentative decision to deny the mandamus petition, citing section 6255. The tentative decision reflected the court's view that disclosing contents of the proposals prior to the ultimate selection of the successful bidder would adversely impact the City's negotiating position. The mandamus petition was heard September 27, 2004. On October 8, 2004, the court issued its decision denying the petition pursuant to section 6255 "because the public interest in nondisclosure clearly outweighs the public interest in disclosure."

DISCUSSION

The Public Records Act was intended to safeguard the accountability of government to the public. (*San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 771.) "To this end, the Act makes public access to government records a fundamental right of citizenship: 'In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state.'" (*Rogers v. Superior Court* (1993) 19 Cal.App.4th 469, 475-476.)

"Because of the strong public policy in favor of disclosure of public records, such records must be disclosed unless they come within one or more of the categories of documents exempt from compelled disclosure. (§ 6254.) These exemptions are construed narrowly, and the burden is on the public agency to show that the records should not be disclosed." (*Rogers v. Superior Court, supra,* 19 Cal.App.4th at p. 476, citing *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 773.) The proponent of nondisclosure must demonstrate a "clear overbalance" on the side of confidentiality. (*City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008, 1018.) If the record is otherwise subject to disclosure, the purpose of the party requesting disclosure cannot be considered. (§ 6257.5.)

The City concedes the proposals are public records. As such, they are open to inspection "in the absence of a privilege or a compelling countervailing public interest." (*New York Times Co. v. Superior Court* (1990) 218 Cal.App.3d 1579, 1586.) The City argued below that it was entitled to withhold the proposals from immediate disclosure under several statutory exemptions. Respondent court correctly found that two of these statutory exemptions did not apply: section 6254, subdivision (h) [real estate appraisals] and section 6254, subdivision (k) [records protected by a statutory privilege].

Respondent court found the City was entitled to delay disclosure of the proposals under section 6255, the "catch-all" exemption, because the public interest served by not disclosing the contents of the proposals prior to the conclusion of negotiations with the successful bidder outweighs any interest the public might have in disclosing them at an earlier time. However, the City has failed to demonstrate there is a "clear overbalance" in favor of delaying disclosure.

According to LAWA, Van Nuys airport is "the world's busiest general aviation airport." It "generates, attracts and supports economic activity in the San Fernando Valley and throughout Southern California." Each year, the airport "contributes around $1.2 billion dollars to the Southern California economy, creates over 10,000 jobs, and generates an earnings impact of $273 million. . . . [LAWA], as owner and operator, leases space to a variety of tenants who provide aviation and non-aviation related services. In so doing, the airport generates $73 million in state and local taxes annually."

A facility of such vital importance to the region is obviously an object of great public interest. A lease of airport facilities is a lucrative proposition for both the airport and the lessee. LAWA has implemented strict guidelines for the awarding of such leases.[6] The public has a significant interest in knowing, prior to LAWA's awarding a

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[6] In March 2001, LAWA implemented a new leasing policy, replacing a policy that had been in effect since 1986. The policy is "primarily focused on: (1) appropriate use, optimal utilization, and competitive allocation of and access to the aeronautical and non-aeronautical real property assets under the jurisdiction of LAWA; (2) reasonable and not unjustly discriminatory methodologies for allocation of essential aeronautical assets; and

project to the bidder of its choice, whether LAWA has acted in accordance with those guidelines or, conversely, whether it has afforded any favoritism or advantage to certain individuals or entities. (See *California State University, Fresno Association, Inc. v. Superior Court* (2001) 90 Cal.App.4th 810, 834.) Members of the public might also be able to point out possible errors or omissions or simply offer their perspectives on the proposed projects. The public cannot have that opportunity if the proposals are kept secret until after the City not only chooses the successful bidder, but concludes its negotiations.

The City contends it cannot get the best value for the public, or put the property to the best and highest use, if the contents of the proposals are disclosed "prematurely," that is, before LAWA has concluded negotiations with the successful bidder. The City claims that premature disclosure of the proposals might jeopardize the City's negotiating position and make it "vulnerable to private interests that would be able to use the information contained in the proposals to manipulate the proposal process in order to gain a more favorable agreement."

The City has never satisfactorily explained, either in its briefs or at oral argument, just how "premature" disclosure of the contents of the proposals would jeopardize its negotiating position or, conversely, why keeping the contents of the proposals a secret is in the public's best interests. First, the proposals cannot be changed once the deadline for submitting them has passed. Thus, the proposers could not amend their proposals to tailor them to those of competitors. Second, the City has an enormous negotiating advantage simply by virtue of the fact that it reserves the right to "reject any or all Proposals, . . . advertise for new Proposals or to proceed otherwise." If the City's negotiations with the successful bidder do not produce the desired result, the City can simply decline to award the lease to that bidder. Finally, the City's negotiating position could only be enhanced by the successful bidder knowing that if its negotiations with the City are not fruitful, there are competitive proposals waiting in the wings should the City

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(3) selected lease provisions appropriate to the tenants and prospective tenants of

ultimately decide to reject that proposal altogether. Thus, disclosure of the contents of all proposals prior to the final negotiations can only benefit the public.

The public's interest in making the proposals public once the deadline for amending them has passed far outweighs the City's vague and speculative reasons for keeping them secret. The public has a significant interest in assuring itself that LAWA is following its own guidelines selecting the successful proposer, and is not selecting these individuals or entities based on political favoritism or some other criteria that do not serve the public.

Our conclusion is consistent with California Supreme Court cases holding that competitive bidding statues, charters and ordinances exist "for the purpose of inviting competition, to guard against favoritism, improvidence, extravagance, fraud and corruption, and to secure the best work or supplies at the lowest price practicable . . . ." (*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal.4th 305, 314, citing *Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161; Pub. Contract Code §100, subds. (b)-(d) [Legislature's intent in enacting Public Contract Code includes "ensur[ing] full compliance with competitive bidding statutes as a means of protecting the public from misuse of public funds," "provid[ing] all qualified bidders with a fair opportunity to enter the bidding process, thereby stimulating competition in a manner conducive to sound fiscal practices," and "eliminat[ing] favoritism, fraud, and corruption in the awarding of public contracts."].)

LAWA's real property assets."

DISPOSITION

The petition for writ of mandate is granted. A peremptory writ shall issue directing respondent court to vacate its order of October 8, 2004, denying petitioner's mandate petition, and enter a new and different order granting the petition. Costs of this proceeding are awarded to petitioner. The City's motion to strike portions of the petition is denied.

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ARMSTRONG, J,

I concur:

TURNER, P.J.

MOSK, J., Dissenting

I respectfully dissent and would deny the petition for writ of mandate and uphold the trial court's decision under Government Code section 6255 (part of the California Public Records Act, Gov. Code, § 6250, et seq.) not to compel the real parties in interest (City) to disclose lease bid documents prior to the recommendation of, and negotiation with, a bidder or bidders. The trial court correctly determined, based on substantial evidence, that "not disclosing the record clearly outweighs the public interest served by disclosure of the record." (Gov. Code, § 6255.)

Standard of Review

The standard of review of the trial court's order is "independent review of the trial court's ruling; factual findings made by the trial court will be upheld if based on substantial evidence." (*Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1336; *CBS Broadcasting Inc. v. Superior Court* (2001) 91 Cal.App.4th 892, 906; see Gov. Code, § 6259.) It appears that courts have viewed the actual weighing process between the public interest in nondisclosure and the public interest in disclosure as a legal issue. (See *CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 650-651.) One authority has noted that no matter what the definitions of fact and law for appeal purposes,[1] "in practice the

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[1] The Supreme Court has said, "In theory, a determination is one of ultimate fact if it can be reached by logical reasoning from the evidence, but one of law if it can be reached only by the application of legal principles." (*Board of Education v. Jack M.* (1977) 19 Cal.3d 691, 698, fn. 3.) The Supreme Court later added, "If the pertinent inquiry requires application of experience with human affairs, the question is predominantly factual and its determination is reviewed under the substantial-evidence test. If, by contrast, the

line between fact and law is impossible to draw with precision. . . . The result is that a court may, in the guise of examining questions of law, interfere with the fact-finding power of the trial judge or jury, or may refuse to review questions of law by treating them as issues of fact." (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 316, pp. 354-355.)

Aside from the weighing process itself, the trial court's factual findings, actual and implied, such as the actual or potential benefits and detriments of disclosure, are reviewed under a sufficiency of the evidence standard. "In resolving the issue of the sufficiency of the evidence, we are bound by established rules of appellate review to view all factual matters in the light most favorable to the prevailing party." (*Aceves v. Regal Pale Brewing Co.* (1979) 24 Cal.3d 502, 507, overruled on another ground by *Privette v. Superior Court* (1993) 5 Cal.4th 689; *Nordquist v. McGraw-Hill Broadcasting Co.* (1995) 32 Cal.App.4th 555, 561.) "[T]he power of an appellate court *begins* and *ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination [of the trier of fact], and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the [trier of fact]." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874, original italics.) Moreover, "[a] judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness." (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 133.) Thus, while we may weigh the competing public interest factors de novo, we must assume that the trial court made certain findings as to the existence of those "facts of the particular case" (Gov. Code, § 6255) that support the judgment, so long as those findings are supported by substantial evidence.

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inquiry requires a critical consideration, in a factual context, of legal principles and their underlying values, the question is predominantly legal and its determination is reviewed independently." (*Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888.)

Substantial Evidence Supports the Trial Court's Findings

As the trial court noted, the issue in this case is not whether disclosure of bid proposals for a lease at the Van Nuys Airport should be made, but when they should be made. The question is whether a city agency must disclose competitive bids for a lease on public property before that agency had selected a bidder with which to negotiate a lease and before any lease contract is submitted to the awarding authority. The trial court found that there was little benefit to the public by such disclosure and that the disclosure would adversely affect the public interest because revealing specific details of the bid proposals at that time would impair the City's selection and negotiating process. Substantial evidence supports the trial court's findings.

Petitioner, a law firm that apparently represents those doing, or seeking to do, business with airports, sought in its petition public disclosure of bid proposals for leases at the Van Nuys Airport at a time when the City of Los Angeles Department of Airports (known as Los Angeles World Airports or LAWA) had not yet made its determination of the best qualified bidder. Respondents' evidence showed that by the time of the trial court hearing on the petition, after the petitioner's request for the documents and the filing of the petition, one of the bidders had been singled out, but the City's Board of Airport Commissioners (Board) requested further review of all the proposals, a recalculation of the value of the proposals, and that interviews be conducted—all before there could be authorization even to negotiate with a bidder.

In addition, the City submitted evidence that it had been "the longstanding practice of the City of Los Angeles, Department of Airports to withhold release of proposals submitted in response to Requests for Proposals until the contract is awarded because earlier release would have a negative impact on the proposal process." The City, in its evidence, pointed to the adverse consequences of prematurely releasing proposals. From this evidence and the evidence of the contract process, the trial court had substantial evidence supporting its express and implied findings of facts suggesting that at the time in question, disclosure of the documents would contribute little public benefit and would detrimentally affect the public interest.

Petitioner has not identified any public benefit for disclosure at the time of its request. As this court has said, the California Public Records Act "was intended to safeguard the accountability of government to the public." (*Rogers v. Superior Court* (1993) 19 Cal.App.4th 469, 475.) Public scrutiny of the lease process and accountability of the decisionmakers will be served better after the negotiating process, LAWA's decision, and, perhaps, after the actual decision to award the lease contract by the Board. Those interested in the integrity of the City's decisionmaking practices will be able to make such an evaluation after decisions are actually made. The idea that members of the public should have input into the selection of, and negotiation with, potential lessees would add undesirable pressures, political and otherwise, to the process.

Petitioner argued that if disclosure were delayed, interested parties would only have a limited amount of time to review the final lease and object to that lease. As the trial court noted, "This argument, by its very terms amounts to an interested party's interest in disclosure and not a public interest in favor of disclosure sufficient to alter the balancing of authorities . . . ."

The request for proposals suggests that LAWA might elect to negotiate with more than one bidder. If the disclosure of bids takes place prior to negotiations with one or more bidders, the City's ability to obtain the most favorable arrangement may be jeopardized once a negotiating bidder becomes aware of the content of competitive bids because that bidder would no longer be in doubt as to its relative bargaining position. For

example, a bidder that is negotiating will be in a position to know that it does not have to accede to City requests because of the content of other bids. The request for proposals also contemplates that changes and amendments to bid proposals will take place during negotiations. During negotiations, bidders may adjust their bids—presumably to the detriment of the City—if they have knowledge of other bids.

The disclosure of the contents of proposals prior to negotiations will not necessarily result in a benefit to the public. A bidder may determine that other bids are not competitive and can therefore adopt a rigid negotiating stance. The notion that proposals cannot be changed once the deadline for submitting them has passed does not, in practical effect, appear to be accurate. There are negotiations with bidders over the terms of the bids. If changes could not be made, there would be nothing to negotiate. Moreover, the City can reopen the bidding process. The disclosure of bids during the pre-decision period may affect the information submitted by bidders and the decisionmaker's deliberations and processes. (See *California First Amendment Coalition v. Superior Court* (1998) 67 Cal.App.4th 159.) The trial court concluded that disclosure of specific details of the proposals would impact LAWA's flexibility in negotiations and could be used against the City to obtain a competitive advantage.[2]

Public Interest in Nondisclosure Clearly Outweighs Public Interest in Disclosure

I do not disagree with the concept of public disclosure of as much government material as feasible. In view of the legitimate interests of the City on behalf of the public and the applicable legal standards, I do not believe we should reverse the trial court's decision. In weighing the facts found by the trial court, I conclude that the trial court correctly determined that the City had carried its burden to show that the public interest

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[2] With regard to federal contracts, there are prohibitions on the disclosure of bid or proposal information prior to the award of the contract (41 U.S.C., § 423(a); see also 41 U.S.C., § 253b(m) [prohibition on release of contractor proposals]; 5 U.S.C., § 552b(3) [exempts from disclosure under Freedom of Information Act matters exempted from disclosure by statute].)

served by not making the proposal or bid records public prior to the time the Board has even selected one or more bidders with which to negotiate clearly outweighs the public interest served by disclosure of the documents at that time. (Gov. Code, § 6255.)

CONCLUSION

I would deny the petition for writ of mandate.

MOSK, J.